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THE IMPARTIAL JUDGE:
DETACHMENT OR PASSION?

Jeffrey M. Shaman*

[Judges] do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.1

I. INTRODUCTION

In our legal system, judicial impartiality is a fundamental component of justice. We expect our judges to be, above all else, impartial arbiters so that legal disputes are decided according to the law free from the influence of bias or prejudice. The principle of judicial impartiality is dictated by statutory and common law,2 is required by the Code of Judicial Conduct,3 and is essential to due process of law. Thus, it is no exaggeration to say, as did the Supreme Court of New Hampshire, that “It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.”4

Like many other fundamental principles, however, this one is not always easy to translate into specific application. Pure impartiality is an ideal that can never be completely attained. Judges, after all, are human beings who come to the bench with feelings, knowledge, and beliefs that cannot be magically extirpated. They may have prior knowledge about evidentiary matters in a case, or strong beliefs about legal issues they must decide. They may have feelings about the attorneys, parties, or witnesses who appear before them. Furthermore, judges engage in extrajudicial activities that may affect their ability to be impartial.5 They have relatives and friends who may appear before

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3. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990) [hereinafter MODEL CODE].
5. For example, some extrajudicial activities identified in the Model Code include speaking engagements, written commentary, participation in charitable or civic groups and related activi-
them in court. They participate in civic, charitable, and business activities that may create conflicts of interests. In sum, judges do not live in ivory towers and are not immune to the foibles of the human condition. Nonetheless, we demand that they adhere to the highest degree of impartiality that is mortally possible.6

II. THE CODE OF JUDICIAL CONDUCT

In the United States, judges are governed by the Code of Judicial Conduct, which traces its roots to the Canons of Judicial Ethics originally set forth by the American Bar Association in 1924.7 The 1924 Canons, which were drafted by a committee headed by Supreme Court Chief Justice William Howard Taft, were intended to be an ideal guide of behavior rather than an enforceable set of rules.8 Despite their precatory intent, the Canons were officially adopted for use by a number of states, although they were rarely enforced.9 The Canons have been criticized for their emphasis on “moral posturing” that proved to be more “hortatory than helpful in providing firm guidance for the solution of difficult questions.”10 Moreover, the 1924 Canons reflected the traditional view of the judicial function. That is, they envisioned the ideal judge as one who dispensed justice in a mechanical, detached way. Canon 20 proclaimed:

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him . . . . He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge under the sanction of law.11

6. See, e.g., Model Code Canon 3E cmt. (stressing the importance of judicial impartiality by requiring disqualification in a proceeding “whenever the judge’s impartiality might reasonably be questioned”).


8. See Canons of Judicial Ethics (1924) for a statement from the Preamble regarding original intent: “The [American Bar] Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.”

9. See Martineau, supra note 7 and accompanying text (commenting that based on the Canons’ suggestive versus regulatory nature, the states adopted what the ABA originally intended, that is, guidelines for judicial conduct).


Thus, justice was seen as an impersonal system, a system of "law not of men." A judge was expected to apply general legal principles and to eschew any personal view of justice. Indeed, the judge's personal belief was considered arbitrary and a thing apart from the law.

The next Canon, Canon 21, was entitled "Idiosyncrasies and Inconsistencies," and included the following statement:

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court.

No doubt, there is some sound advice in Canon 21. Certainly it is best for a judge to avoid being "peculiar" or even "idiosyncratic," although perhaps being "spectacular" or "sensational" once in a great while might not be so contemptible. According to Canon 21, however, a judge should be neither individualistic nor extreme; passion and zeal are best avoided in the ideal judge.

In 1972, the ABA substantially rewrote the Canons and gave them a new name, the Model Code of Judicial Conduct. Then, in 1990, the ABA revised the Model Code, amending some specific details and adding others, while maintaining its basic standards. Unlike their predecessor, both the 1972 and 1990 Codes were designed to be mandatory and enforceable.

Some version of the Code of Judicial Conduct has been officially adopted in forty-eight states, the District of Columbia, and the federal court system. Only Montana and Wisconsin remain as hold-outs in adopting the Code, although those two states have adopted their own rules of conduct for judges. Moreover, every state, as well as the District of Columbia, has established some agency to enforce its Code or rules, and has authorized a variety of sanctions that may be im-

12. Id.
13. Id. Canon 21.
14. Id.
17. See id. at 8 (explaining the 1990 Code Committee’s decision to maintain the enforceable nature of the 1972 Code by keeping the Canons clear and distinct from their corresponding sections); Thode, supra note 15, at 43 (making special note of the 1972 Code Committee’s insistence on including a system of enforceable standards).
18. See Shaman et al., supra note 2, at 3-4 (stating that this near nationwide adoption of the Code helps standardize judicial conduct from state-to-state).
19. Id. at 4.
posed upon judges who violate ethical standards.\textsuperscript{20} In the federal system, judicial councils in each circuit enforce the Code and apply sanctions for its violation.\textsuperscript{21}

The Code of Judicial Conduct governs off-the-bench as well as on-the-bench conduct of judges. It places restrictions upon extrajudicial activities\textsuperscript{22} in addition to restrictions upon activities that are part of the official judicial function.\textsuperscript{23} Indeed, the Code expressly states that "a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities," and "shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."\textsuperscript{24}

Certainly there are reasons to place some restrictions upon a judge's extrajudicial activities. Off-the-bench activity may distract a judge or interfere with the proper performance of the duties of office.\textsuperscript{25} Extrajudicial activity may give rise to bias or a conflict of interest that should be avoided, or it may demean the integrity of the judiciary.\textsuperscript{26} And judges should not be able to exploit their judicial office for private gain.\textsuperscript{27}

But that is not to say that all restrictions upon a judge's off-the-bench activities are justifiable. As previously noted, judges do live in the real world, and cannot be secluded from society.\textsuperscript{28} As individuals, judges should be allowed outside activity and interaction with other people. Moreover, judges can benefit society in ways that would not be possible if their extrajudicial activities are unduly restricted. Per-

\begin{itemize}
  \item \textsuperscript{20} Id. at 5-7.
  \item \textsuperscript{21} Id. at 7-8.
  \item \textsuperscript{22} See Model Code Canon 4 (covering all areas of extrajudicial conduct, including quasijudicial behavior, nonjudicial activities, and financial disclosure).
  \item \textsuperscript{23} See id. Canon 3 (dividing these official duties into six general categories including duties in general, adjudicative responsibilities, administrative obligations, disciplinary rules, and disqualification duties).
  \item \textsuperscript{24} Id. Canon 2 (emphasis added).
  \item \textsuperscript{25} See, e.g., Shaman et al., supra note 2, at 277 (listing potential judicial distractions as business involvement, investments, and participation or membership in charitable or civic organizations).
  \item \textsuperscript{26} See id. at 268-70 (noting that Canon 5 of the Model Code has been interpreted to require judges to abstain from membership in such organizations as the Ku Klux Klan, as well as from serving as board members to groups, such as a legal aid society or Mothers Against Drunk Drivers that are engaged in frequent litigation).
  \item \textsuperscript{27} See, e.g., In re Yaccarino, 502 A.2d 3 (1985) (disciplining judge for using confidential information from a case before him to pressure a litigant in the case to sell him real property at an extremely favorable price).
  \item \textsuperscript{28} See McKay, supra note 10 (commenting that judges must be familiar with the world outside of the courtroom in order to properly settle the disputes over which they preside).
\end{itemize}
haps most important, involvement in the outside world can enrich judicial sensibility and thereby enhance judicial ability.29

There are those who believe that the Code of Judicial Conduct goes too far in attempting to disengage judges from the outside world.30 Professor Charles Wolfram, for one, has criticized the Code for tipping the balance too far toward isolating judges from the rest of society.31 The Code, he says, "fall[s] just short of requiring that judges undertake a kind of monastic withdrawal from the world."

The latest version of the Code of Judicial Conduct, the 1990 version, acknowledges that "[c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives."32 Furthermore, Canon 4 of the Code expressly allows judges to engage in certain extrajudicial activities, including speaking, writing, lecturing, and teaching, so long as they do not cast doubt on judicial impartiality, demean the judicial office, or interfere with the proper performance of judicial duties.33 Commentary to Canon 4 notes that because of their special learning, judges are in a unique position to contribute to the improvement of the law and legal system, and the Commentary therefore actively encourages judges to participate in extrajudicial activities concerning the law and legal system.34 In that respect, the Code of Judicial Conduct is consistent with the principles of the First Amendment of the Constitution, according to which there is great value in participating in public discourse.35 It is by participating in public discourse, or in the marketplace of ideas, that we improve our laws, our legal system, our government, our society, our lives.36

29. See Hon. Shirley S. Abrahamson, Refreshing Institutional Memories: Wisconsin and the American Law Institute, 1995 Wis. L. REV. 1, 25-30 (illustrating the delicate balance between judicial observation of debates outside the courtroom and the appearance of improper ex parte communication with a story about Judge Benjamin Cardozo and his attendance, not participation, at pre-Palsgraf debates).
30. See CHARLES WOLFRAM, MODERN LEGAL ETHICS 980 (Practitioner ed. 1986) (referring to a comment by Jerome Frank that a judge could only achieve this "ideal" disengagement through death).
31. See id. (criticizing the "idealized model" for forcing judges to discontinue valuable outside commitments).
32. Id.
33. MODEL CODE Canon 4A cmt.
34. Id. Canon 4A.
35. Id. Canon 4B cmt.
36. See, e.g., Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring) (asserting that "a fundamental principle" of the American government is freedom of expression and that "public discussion is a political duty" of its citizens).
37. See Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade of ideas—that the best test of truth is the power of the thought of get itself accepted in the competition of the market . . . ").
III. THE IDEAL OF THE DISINTERESTED JUDGE

The 1924 Canons envisioned an ideal judge who was neutral, impersonal, and disinterested.38 That traditional vision of the ideal judge has persisted in more recent times. As one court put it, "[i]t is axiomatic that a judge serves as a neutral and detached magistrate."39 Or, as Justice Frankfurter once noted, a judge "must think dispassionately and submerge private feelings on every aspect of a case."40 This view of the judicial function stresses disengagement, and calls for judges who are disinterested, detached, and dispassionate.

Perhaps the most prominent jurist who embodied the ideal of the disinterested judge was the great Supreme Court Justice, Oliver Wendell Holmes, Jr. G. Edward White, a biographer of Holmes and an assiduous student of his thought, has described Holmes' approach to judging, at least on the Supreme Court, as follows:

Detachment seems the most accurate term to characterize Holmes' stance on the Supreme Court. He was not merely skeptical; his emotions were for the most part not engaged. To put it more precisely, his emotions were stimulated by the professional features of his work but not by its substance. Few judges could pack more emotion into an opinion, but the emotion was not often generated from compassion for the litigants or concern for the seriousness of the issue at stake. It was the emotion of a literary talent, a person who liked the sound of memorable phrases . . . .

One can see Holmes' stance of detachment as the culmination of his intellectual history . . . . Acquaintances of Holmes had from his early years noted his apparent indifference to others. His father thought he "look[ed] at life as at a solemn show where he is only a spectator."41

One of the more disquieting aspects of Holmes' detachment was his indifference to the world around him. He never read a newspaper42 and professed that facts were a "bore."43 Indeed, he flatly stated, "I hate facts."44 On one occasion he bristled with indignation when Justice Brandeis suggested that he spend a summer improving his mind.

38. See CANONS OF JUDICIAL ETHICS Canons 20, 21, 25-33 (1924) (governing neutrality in decisions, consistency in judgments, and detachment from many community activities).
43. II HOLMES-POLLOCK LETTERS 14 (Howe ed. 1941).
44. Id. at 13.
by studying some "domain of fact" and visiting factories to observe working conditions there.45

Holmes' disinterest is illustrated in an exchange he once had with another great judge, Learned Hand.46 The two jurists had shared a ride in an old coupe, with Holmes on his way to a Supreme Court conference. As they started to walk their separate ways, Hand said, "Well, sir, good-bye. Do justice."47 Turning sharply, Holmes called out to Hand, "Come here. Come here."48 Then Holmes delivered a short lecture to Hand. "[Doing justice,]" Holmes said, "is not my job. My job is to play the game according to the rules."49 On another occasion Holmes went so far as to say, "I hate justice."50

A similar antipathy shows up in Holmes' correspondence with the English political scientist Harold Laski. In one letter to Laski, Holmes proclaimed that: "If my fellow citizens want to go to Hell I will help them."51 That sort of sentiment has prompted one observer to portray Holmes as "fundamentally antithetical in his detached acceptance and detached rejection of men as he saw them."52 "To a remarkable degree, Holmes simply did not care."53

Holmes' detachment is apparent in his dissenting opinion in Lochner v. New York,54 an opinion that has garnered more credit than it may deserve. In Lochner, a case that led to the "New Deal Court Crisis" and has come to symbolize the excesses of judicial intervention, a slim majority of the Supreme Court ruled that a labor law setting maximum hours for bakers unduly interfered with liberty of contract and therefore was a violation of the Due Process Clause of the Fourteenth Amendment.55 The five-person majority equated due process of law with an extremely conservative economic policy and in the bargain bestowed an undeserved constitutional status upon the concept of liberty of contract. This provided Holmes, who of course

45. Id.
47. Id. at 307.
48. Id.
49. Id.
50. Id. at 306.
51. See I HOLMES-LASKI LETTERS 249 (Howe ed. 1953) (explaining to Laski how he (Holmes) hoped he was not influenced by his personal opinion in the Steel Trust case since he knew the nation "liked" the law).
52. See Rogat, supra note 42, at 226 (concluding that Holmes accepted the transgressions of humankind while refusing to be concerned with the destruction between humans).
53. Id. at 255.
54. 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).
55. Id.
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had a genius for aphorisms, with the opportunity for one of his better ripostes. "The 14th [sic] Amendment," he retorted in dissent, "does not enact Mr. Herbert Spencer's Social Statics."56

Another dissenting opinion written by the first Justice Harlan (and joined by Justices White and Day) was less clever but more careful.57 Justice Harlan pointed out that liberty of contract was not absolute and could be limited by state regulations reasonably designed to protect health.58 To demonstrate that the law in question was a reasonable health measure, Justice Harlan's dissenting opinion included a good deal of empirical evidence describing the health hazards faced by bakers and showing that in fact their health was substandard.59

This, of course, was of no avail to the majority.60 To Justice Holmes, on the other hand, it was of no interest.61 His dissenting opinion in *Lochner*, which was joined by no other justice, is a typical example of two aspects of Holmes' detachment.62 First, "boring" facts about health hazards or working conditions find no place in his opinion. Second, "doing justice" was not his job. As Holmes put it in his *Lochner* opinion, his "agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."63 The state may regulate life in many ways "as injudicious or if you like as tyrannical as this . . . ."64 In other words, if his "fellow citizens want to go to Hell," Holmes may not offer them affirmative help, but he certainly was not about to lift even a little finger to stop them.65

It is important to note that in many respects Holmes was a great philosopher of law. His book, *The Common Law*—not to mention other works of his—was truly pathbreaking and led to the founding of modern jurisprudence. Insofar as his detachment is concerned, how-

56. Id. at 75 (Holmes, J., dissenting).
57. Id. at 65-74 (Harlan, J., dissenting).
58. See id. at 66-67 (Harlan, J., dissenting) (citing numerous authorities which supported state regulations "designed and calculated to promote the general welfare or to guard the public health . . . .").
59. See id. at 70 (Harlan, J., dissenting) ("Professor Hirt in his treatise . . . has said: 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it.'").
60. See id. at 59 ("We think that there can be no fair doubt that the trade of a baker . . . is not an unhealthy one . . . . There must be more than a mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.").
61. See id. at 75 (Holmes, J., dissenting) (stating that he (Holmes) did not find it his duty to analyze the proposed economic theory or other debated rationales, such as the health hazards of bakers). In fact, Justice Holmes explicitly declined to address the health rationale at all.
62. Id. at 74-76 (Holmes, J., dissenting).
63. Id. at 75 (Holmes, J., dissenting).
64. Id. (Holmes, J., dissenting).
65. 1 HOLMES-LASKI LETTERS, supra note 51, at 249.
ever, Holmes has been subject to a fair amount of condemnation. He has been castigated as "a bleak, harsh figure... a tough old party, quite aware that he was deficient in empathy." He has been called "savage, harsh, and cruel, a bitter and lifelong pessimist." He has been depicted as "emotionally impoverished... a man who suppressed his own feelings and isolated himself from most of those things believed to give life meaning...." To be sure, there are those who see Holmes' emotional estrangement as a positive source for his judicial ability. For instance, one commentator maintains that Holmes was "a profoundly injured spirit, and his greatness as a human being can be justly viewed only in light of that fact." Most observers of Holmes, however, see his emotional detachment as a decided detriment to his judicial capacity.

In all probability, it is Yosal Rogat who strikes the right tone and poses exactly the right question about Holmes' dispassion when he says:

> It is true that we associate detachment with the judicial function, and require a minimum of neutrality. But Holmes more strikingly than any other judge invites a questions that is rarely asked: Whether a minimum of involvement is not also required. Holmes was certainly sufficiently detached. Was he, however, sufficiently engaged?

As a judge—indeed, as a human being—Holmes was truly disinterested. He was genuinely disengaged from the mortal problems that came before him for resolution in case after case. Genuine detachment such as Holmes possessed is a rare quality in judges. Most judges are more engaged than Holmes was about the issues they face. They may, however, attempt, either consciously or unconsciously, to appear detached. They may refrain from expressing their feelings and beliefs. Whether on the bench or off, they may forgo speaking out

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67. Kaplan, supra note 66, at 12-14. After an awakening to Holmes' truer, non-paternalistic, attributes, Kaplan seeks what he calls a "more balanced appreciation of Holmes." Id. at 15-16.

68. Gilmore, supra note 66, at 48-49. Gilmore exposes Holmes' truer, less commendable, attributes in contradistinction to his legendary status at the time of World War I. Id.

69. Aichele, supra note 66, at 164. Aichele concludes that Holmes' deference to the political majority and "deaf-ear" to the plight of the minority was the most troubling aspect of Holmes' approach to the law. Id.

70. Saul Touster, In Search of Holmes from Within, 18 Vand. L. Rev. 437, 470-71 (1965).

71. See, e.g., Rogat, supra note 42, at 243 (highlighting Holmes' detachment from society as the major limitation to his role in the judiciary).

72. Id.
about matters in which they believe. They may abstain from making speeches, writing articles, or engaging in associational activities that manifest their beliefs and ideas. Or, when they do venture to express their views, they may do so cautiously, being careful not to go too far, not to take a position, not to say what they really think.

By curtailing their expression in this way, judges may cultivate an appearance of neutrality when in fact they are not neutral at all. For many judges, Holmesian detachment may be a matter of appearance but not reality. It may be an outward stance that cloaks a judge's inner feelings and beliefs.

So, there are two questions that need to be asked about the ideal of the disinterested judge. First, is it desirable? And second, is it possible?

The ideal of the disinterested judge is tied to the nineteenth century view that law is a science that can be mechanically applied by judges. According to this view, law and the judicial function were thought to be essentially nonideological. Law was seen as neutral, objective, and devoid of values. Hence, it was for the legislative and executive branches of our government, but not the judiciary, to make value judgements or policy choices. Judicial decisions, then, did not require the exercise of will or discretion, and certainly had nothing to do with making values choices. Judges were expected to be unconcerned about policy, or detached from it; it simply was none of their business.

This view of the judicial function persevered through the beginning of the twentieth century. So, for example, in 1905, while striking down a maximum hours law in *Lochner v. New York* on the ground that the law unduly interfered with liberty of contract and was not a valid health measure, the Supreme Court had either the myopia or the temerity to claim that it "was not substituting the judgment of the court for that of the legislature." As late as 1936, Supreme Court Justice Owen Roberts declared that when an act of Congress is chal-
lenged as unconstitutional, "the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former . . . . This court neither approves nor condemns any legislative policy."79

By the time Justice Roberts uttered those infamous words, however, serious doubt about the traditional view of the judicial function was well under way.80 Indeed, the doubt began in 1881, when Holmes, "a generation ahead of his time"81 and two decades before his appointment to the high Court, published his groundbreaking opus, The Common Law. In chapter one, Holmes proclaimed:

[T]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed . . . .

[I]n substance the growth of the law is legislative . . . . It is legislative in its grounds . . . . Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy . . . .82

After Holmes' book, the traditional view of law came under increasing criticism. In 1908 Roscoe Pound published his seminal article, Mechanical Jurisprudence,83 paving the way for a new school of thought, "Legal Realism," that was devoted to exploding the traditional myth that law was separate from policy and values.84 By today, the traditional view of mechanical jurisprudence has been thoroughly discredited as a myth that bears little relationship to the reality of the judicial function.85 Nonetheless, the traditional view has never been entirely abandoned, and it still prevails in some corners more than others. Indeed, there seems to be a never-ending quest to make the law objective and devoid of human value judgments. For example, in the realm of constitutional law, which by character is one of the most political areas of the law, the Supreme Court and some constitutional scholars seem bent upon constructing a network of abstract rules that

80. See generally Horwitz, supra note 74.
82. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1, 35 (1881).
83. See Pound, supra note 73.
84. See White, supra note 41, at 166 (describing Legal Realism as a late 1920s and 1930s jurisprudential movement driven by the principle that "individuals 'made a difference' in politics and government").
85. Id. at 289.
give the appearance of objectivity and neutrality while masking the human value choices that the Court makes.\textsuperscript{86}

Four decades after Holmes' book lifted the veil from the judicial function, another important book about the judicial process was written by another jurist destined to become a Supreme Court Justice. Like Holmes, Benjamin Cardozo was well aware that judging necessarily entailed choosing among values. In \textit{The Nature Of The Judicial Process}, Cardozo wrote:

> My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standard of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case must depend largely upon the comparative importance or value of the social interest that will be thereby promoted or impaired . . . . I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable . . . \textsuperscript{87}

Cardozo understood that in an important sense the judicial function was much like the legislative function.\textsuperscript{88} He explained:

> If you ask how [a judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and [the judge's]. The choice of methods, the appraisement of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence.\textsuperscript{89}

\textsuperscript{86.} See Morton Horwitz, \textit{The Constitution of Change: Legal Fundamentality Without Fundamentalism}, 107 HARV. L. REV. 30 (1993) (tracing the 1992 Supreme Court Term's decisions, and some Justices' apparent reliance on "mechanical jurisprudence" to employ a technical equation that ultimately eliminates their personal values); Jeffrey M. Shaman, \textit{Constitutional Fact: The Perception of Reality by the Supreme Court}, 35 U. FLA. L. REV. 236, 252-53 (1983) (stating that "through the manipulation of constitutional fact, the Supreme Court obscures its own creative function in interpreting the Constitution"); Jeffrey M. Shaman, \textit{Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny}, 45 OHIO ST. L.J. 161, 174 (1984) (finding that a major problem of the Supreme Court's multi-tier review is its focus on abstractions in which the Justices become "primarily concerned with the problem of judicial review, to the exclusion of the specific disputes that gave rise to them").

\textsuperscript{87.} \textit{CARDozo, supra} note 1, at 112, 118-19.

\textsuperscript{88.} \textit{Id.} at 119.

\textsuperscript{89.} \textit{Id.} at 113. It is correct that immediately after the quoted passage, Cardozo went on to say: "No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law." \textit{Id.}

However, shortly after that passage, Cardozo continued to say: "None the less [sic], within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made. The process, being legislative, demands the legislator's wisdom." \textit{Id.} at 115.
Unlike Holmes, however, Cardozo did not shrink from the consequences of the nature of the judicial process. Here is Cardozo as seen through the eyes of yet another Supreme Court Justice, William Brennan, whose comments may be as much about himself as about Cardozo:

Having admitted and demonstrated that judges inevitably confront value choices, Cardozo did not shrink from the implications of that admission. He rejected the prevailing myth that a judge's personal values were irrelevant to the decision process, because a judge's role was . . . governed by external, objective norms. Cardozo acknowledged that judges, like common mortals, cannot divorce themselves completely from their personal, subjective vision . . . . He attacked the myth that judges were oracles of pure reason, and insisted that we consider the role that human experience, emotion, and passion play in the judicial process.90

Thus, if Holmes represents the ideal of judicial detachment, Cardozo represents the ideal of judicial passion. To be sure, it is a very careful passion. Cardozo was chary about his passion, but unlike Holmes, he embraced it. Whereas Holmes thought that doing justice was not his job and if his fellow citizens wanted to go to Hell he would help them, Cardozo believed that the function of judges was to enhance the well-being of their fellow humans.91 “The final cause of the law,” he stated, “is the welfare of society,”92 and the business of judges is to promote social welfare.93

IV. The Obligation to Follow the Law

Justice Cardozo’s exemplary career illustrates that detachment is not a necessary element of judicial impartiality and that passion is not incompatible with the judicial function. To be sure, there are limits to how far a judge should allow his or her passion to go. Judges are, after all, obligated to follow the law. While judges often have a good deal of discretion in interpreting and applying the law, that discretion is not boundless. Judicial discretion is abused when a judge does not comport with the dictate of Canon 3 of the Code of Judicial Conduct

90. William J. Brennan, Jr., Reason, Passion, and The Progress of the Law: The Forty-Second Annual Benjamin N. Cardozo Lecture, 10 CARDozo L. REV. 3, 4-5 (1988); see generally Hon. Shirley S. Abrahamson, Judging in the Quiet of the Storm, 24 ST. MARY'S L.J. 965 (1993) (acknowledging that the judiciary is vulnerable to personal judgments, predilections and experiences even though numerous constraints exist to limit such subjective influences).
91. See CARDozo, supra note 87, at 66-67 (noting that the extent a judge's duty is to extend or restrict existing rules as society deems appropriate rather than to fabricate rules on a whim).
92. Id. at 66.
93. See id. at 67 (arguing that judges should allow the welfare of society to dictate the direction and scope of existing rules).
which states that "[a] judge shall be faithful to the law and maintain professional competence in it."\textsuperscript{94} Ordinarily, when a judge exercises his or her discretion incorrectly—that is, makes a legally incorrect ruling—it is a matter for appeal and does not raise a question of unethical behavior under the Code of Judicial Conduct.\textsuperscript{95} However, some courts have ruled that under certain circumstances legal error—an incorrect exercise of judicial discretion—may be a violation of the mandate of Canon 3 that a judge shall be faithful to the law.\textsuperscript{96}

This is an extremely sensitive issue, because to find that the Code of Judicial Conduct may be violated by an incorrect judicial ruling seems to threaten judicial independence. In this nation, there has been a long-standing belief in judicial independence so that judges can be free to make decisions according to their consciences without undue pressure or influence. Judicial independence is a cornerstone of our legal system recognized in the Code of Judicial Conduct, Canon 1 of which expressly states that the independence of the judiciary should be preserved and that the provisions of the Code should be construed and applied to further that objective.\textsuperscript{97}

Accordingly, it is only under limited circumstances that an incorrect legal ruling will be considered to violate the requirement of Canon 3 that a judge be faithful to the law. An incorrect legal ruling is an abuse of discretion in violation of Canon 3 if it is motivated by bad faith. For instance, unbelievable as it may seem, there are a number of cases that might be called "coin-flip cases,"—that is, instances when judges make a decision by flipping a coin in open court, or by throwing a dart at a dart board, or by taking a vote of the spectators in the courtroom.\textsuperscript{98} That sort of behavior goes distinctly beyond the bounds of judicial independence because it constitutes a complete abdication

\textsuperscript{94} \textbf{MODEL CODE} Canon 3B(2).

\textsuperscript{95} \textit{See In re} Benoit, 487 A.2d 1158 (Me. 1985) (acknowledging that judges occasionally will commit legal errors, and judicial discipline is inappropriate in those cases where something more than mere legal error is absent); \textit{In re} Thomson, 494 A.2d 1022 (N.J. 1985) (holding that if a judge’s ruling regarding a defendant’s constitutional rights is incorrect, it may be reversed on appeal and does not automatically constitute judicial misconduct).

\textsuperscript{96} \textit{See In re} Scott, 386 N.E.2d 218 (Mass. 1979) (acknowledging that a pattern of disregard or indifference to fact or law, especially in juvenile and criminal cases, has led to discipline under the Code of Judicial Conduct); \textit{In re} Troy, 306 N.E.2d 203 (Mass. 1973) (holding that a judge’s misapplication of bail statutes was a gross abuse of discretion and warranted sanctions).

\textsuperscript{97} \textbf{MODEL CODE} Canon 1 cmt.

\textsuperscript{98} \textit{See In re} Daniels, 340 So. 2d 301 (La. 1976) (holding that coin-flipping or holding a spectator ballot prior to a judge’s ruling on a defendant’s guilt or innocence gives the public the improper impression that the outcome of cases is arbitrary and injures the public confidence in the integrity and impartiality of the judiciary); Currin v. Commission on Judicial Fitness & Disability, 815 P.2d 212 (Or. 1991) (holding that plaintiff is entitled to examine complaints and depose complainants regarding a judge’s practice of coin-flipping in traffic infraction cases); \textit{see also In
of the duty to exercise judgment. The essence of the judicial function is to make judgments, in other words, to make reasoned decisions according to the law. Deciding a case by the flip of a coin is decision-making completely without reason and that ignores the law. In fact, it violates Canon 1 of the Code of Judicial Conduct, which requires judges to uphold the integrity of the law; it violates Canon 2, which requires judges to avoid impropriety and the appearance of impropriety; and it violates Canon 3, which requires judges to decide cases impartially and diligently, as well as to be faithful to the law and maintain professional competence in it.

Another instance of ignoring the law occurred in a 1991 case from Massachusetts, *In re King*, which involved a judge who set unusually high bail for four African-American defendants in retaliation for the overwhelming rejection of his brother by African-American voters in a gubernatorial primary election. After imposing the bail, the judge said to a court clerk, "[t]hat's what blacks get for voting against my brother." Unlike the coin-flip cases, here the judge had a reason for the decision he made, but it was a reason completely at odds with the law. Obviously, that the African-American community voted against the judge's brother has nothing to do with the legally appropriate amount of bail. To impose high bail for that reason is a gross abuse of judicial discretion that is unfaithful to the law and abdicates the judicial duty to exercise judgment according to the law.

V. Openmindedness

These cases remind us that judges are not autocrats. They are obligated to be faithful to the law and to apply it impartially. Moreover, judges are expected to be openminded in regard to the cases

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re Rose, unreported determination (N.Y. 1979) (telling defendant in open court that the judge was dismissing defendant's criminal charges because it was the judge's first case).

99. MODEL CODE Canon 1.
100. *Id.* Canon 2.
101. *Id.* Canon 3.
103. *Id.* at 594.
104. *Id.* at 599. The Supreme Judicial Court of Massachusetts found that the judge in this case had committed a number of violations of the Code of Judicial Conduct and therefore censured him and permanently enjoined him from sitting in his court. *Id.*

Judges are not autocrats; they are not police forces; they are not religious advisors; and they do not legislate their own rules and statutes. Rather, they are impartial arbiters under the precedents, rules of court and statutes of this Commonwealth to insure that those who appear before them receive justice. The power of a judge is enormous, and concomitantly, no position in our society demands higher standards.

*Id.*
over which they preside. It is often said that to maintain the requisite
degree of impartiality, judges should not predetermine their decisions.
In other words, they should keep an open mind about the outcome of
a case until all of the evidence and arguments have been presented.

Still, as a case proceeds, it is only natural for a judge to form various
opinions about it. As one court explained, any evidence heard by a
judge is bound to engender a certain reaction or attitude regarding
how the case may be decided, but so long as the judge is not influ-
enced by extraneous factors and so long as the judge keeps an open
mind about the final outcome of the case, the judge will be considered
sufficiently impartial.\textsuperscript{106}

If made before a jury, a judge's comments on the evidence as a case
proceeds may be improper because they unduly influence the jurors,
but such comments do not necessarily indicate bias on the part of the
judge and are not improper where no jury is present.\textsuperscript{107} Comments or
remarks made in court that are indicative of a judge's reaction to evi-
dence are not disqualifying so long as the judge has not made a final
decision in the case.

On occasion, judges voluntarily disqualify themselves if they feel
they cannot be openminded in a case. For example, some years ago
Justice Frankfurter voluntarily recused himself from a case in which
two bus passengers claimed that their right of privacy was violated
when a public utility commission gave its approval to a bus company
to pipe music and other radio programs into its buses.\textsuperscript{108} In stepping
aside from the case, Justice Frankfurter explained: "My feelings are
so strongly engaged as a victim of the practice in controversy that I
had better not participate in judicial judgment upon it."\textsuperscript{109} It is inter-
testing that Frankfurter felt compelled to disqualify himself, but could
not resist the temptation to remark in the official Supreme Court re-
ports, no less, that he was a "victim" of the practice in controversy.\textsuperscript{110}
Still, Frankfurter deserves credit for being able to admit of his own
volition that he could not be openminded about the case.

\textsuperscript{106} Banks v. Department of Human Resources, 233 S.E.2d 449, 450 (Ga. 1977); see also In re
J.P. Linahan, Inc., 138 F.2d 650, 653-54 (2d Cir. 1943):
The court room is a place of surging emotions . . . . [T]he parties are keyed up to the
contest, often in open defiance; and the topics at issue are often calculated to stir up the
sympathy, prejudice, or ridicule of the tribunal . . . . If the judge did not form judg-
ments of the actors in those court-house dramas called trials, he could never render
decisions.

\textit{Id.}

\textsuperscript{107} Banks, 233 S.E.2d at 450.


\textsuperscript{109} \textit{Id.} at 467 (separate opinion of Frankfurter, J.)

\textsuperscript{110} \textit{Id.}
Often it is extremely difficult to determine exactly when a judge has crossed the line and lost the requisite degree of openmindedness. Consider, for example, *Haines v. Liggett Group, Inc.*, a 1992 decision that concerned a tort action claiming that the decedent's death had been caused by smoking cigarettes produced by the defendant company. The case had been in litigation for over four years when the United States Court of Appeals for the Third Circuit removed the trial judge, Judge Sarokin, from further presiding over the case, because he made the following statement in an interim opinion:

In the light of the current controversy surrounding breast implants, one wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity! As the following facts disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.

Although professing that its decision was "most agonizing," the Court of Appeals nonetheless ordered that Judge Sarokin be removed from the case. In the view of the appellate court, Judge Sarokin was disqualified because the statement he made concerned one of the "ultimate issues to be determined by a jury" in the case—whether the defendants had concealed information about the risks of smoking. Therefore, the Court of Appeals concluded that the trial judge could no longer maintain the appearance of impartiality that is required by due process of law.

The Court of Appeals certainly was correct that Judge Sarokin's statement concerned an ultimate issue in the case, namely, whether

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111. 975 F.2d 81 (3d Cir. 1992).
112. *Id.*
113. The Court of Appeals also noted that Judge Sarokin was "a distinguished member of the federal judiciary for almost 15 years and . . . is well known and respected for magnificent abilities and outstanding jurisprudential and judicial temperament." *Id.* at 98. In disqualification cases, this sort of praise coming from an appellate court often is the kiss of death for trial judges. In another case, for example, an appellate court began its opinion by describing the trial judge as "one of the ablest and most experienced judges of [a] distinguished trial bench," before quickly moving on to order his disqualification from the case. *In re International Bus. Machines Corp.*, 45 F.3d 641, 642 (1995). In the case of Judge Sarokin, however, sometime after *Haines* he was promoted to the Court of Appeals in an apparent confirmation of his ability as a judge. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 591 (4th ed. 1995).
114. *Haines*, 975 F.2d at 98.
115. *Id.*
the defendants had fraudulently concealed information about the dangers of smoking. But, in addition to being an ultimate issue for the jury to decide, it also was an interim issue raised through a discovery motion that Judge Sarokin was required to rule upon at that point in the litigation.\textsuperscript{116} The plaintiff in the case had asked the judge to order the defendant to produce certain documents that the plaintiff believed showed that the tobacco industry had intentionally concealed information about the dangers of smoking.\textsuperscript{117} The defendants claimed the documents were exempt from discovery under either the attorney-client or work-product privilege, while the plaintiffs countered that those privileges were nullified by the crime-fraud exception.\textsuperscript{118} Thus, in ruling on the discovery motion, it was necessary for Judge Sarokin to decide the question of fraudulent concealment.

One commentator has argued that Judge Sarokin's statement went too far because, in ruling on the discovery motion, all that was necessary to decide was whether there was \textit{prima facie} evidence of fraudulent conduct.\textsuperscript{119} But if the evidence clearly established more than a \textit{prima facie} case of fraudulent conduct, what could be wrong about saying so?

Apparently, the judge's sin was not that he commented on an issue of ultimate fact, but rather that his comment was perceived as an overstatement. But what if his comment was supported by the evidence and was factually accurate? If so, is it fair to characterize it as "overstatement?" Moreover, it rarely is considered disqualifying when judges make extreme statements in the course of their work, even when they comment on ultimate issues of fact. So long as a judge remains openminded about the final outcome of a case, statements made by the judge in response to evidence presented in the case do not amount to disqualifying bias. Ordinarily, to be disqualifying, judicial remarks must derive from an extrajudicial source. Comments made by a judge in the context of litigation are considered a normal aspect of adjudication and are not disqualifying unless they are so egregious as to destroy all semblance of openmindedness.

The Supreme Court has said that "[j]udicial rulings alone almost never constitute valid basis for a bias or partiality motion . . . and can only in the rarest of circumstances evidence the degree of favoritism

\textsuperscript{116} Id. at 85.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 85-86.
\textsuperscript{119} Panel Discussion—Disqualification of Judges (The Sarokin Matter): Is It A Threat To Judicial Independence?, 58 BROOK. L. REV. 1063, 1081 (1993) (noting that Judge Sarokin's comments lashing out at the tobacco industry and displaying his outrage were inappropriate at the beginning of a trial where the jury had not yet been selected).
or antagonism required [for disqualification]." 120 In fact, there are a number of cases in which it has been held not to be improper bias for a judge to express extreme disapproval of a defendant's behavior. In one case, it was found not to be disqualifying for a judge to describe the defendants as part of "a large scale conspiracy composed of the most vicious individuals that this court has ever seen." 121 In another case, it was ruled not to be disqualifying for the judge to describe the defendant as "[t]he most viciously antisocial person who has ever come before me." 122 There are even several cases that go so far as to hold that it is not disqualifying for a judge to announce before all the evidence has been presented in a case that he or she believes the defendant to be guilty as charged. 123 Compared to those comments, Judge Sarokin's statement in Haines hardly seems to be so extreme that he should be disqualified from presiding over the case.

It is instructive to compare the Haines case to another federal case, United States v. Barry, 124 that was decided the same year, but in a different federal circuit. In Barry, the United States Court of Appeals for the District of Columbia found that a trial judge who states his or her views about the merits of a pending proceeding does not necessarily create an appearance of partiality that requires recusal. 125 In this case, the trial judge, Judge Jackson, was presiding over the criminal prosecution of former Washington, D.C. Mayor Marion Barry, who was convicted of one misdemeanor count for possession of cocaine and acquitted of another possession charge, while the jury could not reach a verdict on twelve other counts. 126 While an appeal was pending which would eventually see the case remanded to Judge Jackson for resentencing, Judge Jackson made some public comments about the case in a speech at Harvard Law School. In the speech, the judge

121. United States v. Archbold Newball, 554 F.2d 665, 681 (5th Cir. 1977).
123. See, e.g., State v. Smith, 242 N.W.2d 320 (Iowa 1976) (holding that the trial judge did abuse his discretion in sentencing the defendant to life imprisonment even though he told defense counsel that the defendant may stand a better chance with a jury); Commonwealth v. Leventhal, 307 N.E.2d 839 (Mass. 1974) (holding that a judge's prejudicial remarks during trial displaying to the jury his belief in the defendant's guilt did not affect the disposition of the case); United States v. Sutherland, 463 F.2d 641 (5th Cir. 1972) (acknowledging that a judge does reach some conclusions as to guilt before the close of the trial, and thus, a judge's statement that a defendant is guilty during pre-trial hearings does not deprive the defendant of a fair and impartial trial); People v. Diaz, 427 P.2d 505 (Cal. 1967) (holding that a judge's comment while in his chambers that everyone is convinced of the defendant's guilt before the trial ended did not show that the judge was prejudiced in denying defendant's motion for a new trial).
125. Id. at 263.
126. Id. at 261.
said that he was convinced that Barry was guilty of perjury and other crimes. Judge Jackson further remarked that he had never seen a stronger government case, that some jurors had their own agendas and would not convict under any circumstances, and that some jurors were determined to acquit the petitioner regardless of the facts.

Mayor Barry argued that these comments created an appearance of partiality that required disqualification of the judge. The Court of Appeals, however, while noting that a judge should abstain from out-of-court public comment about a pending proceeding, concluded that the judge's remarks did not require his disqualification. The appellate court pointed out that the long-standing rule is that to be disqualifying, the appearance of bias or prejudice must stem from an extrajudicial source. In this case, virtually all of the judge's extrajudicial remarks were based on previous comments that he had made at the sentencing of the defendant. The Court of Appeals also noted that a judge's remarks that reflect strong views about a defendant do not call for recusal if the remarks are based on the judge's own observations during the performance of his judicial duties. Recusal is not required unless the remarks give rise to a reasonable appearance that the judge cannot be impartial. In this instance, the court concluded that such an appearance had not been established, and that recusal was not necessary.

If recusal was not necessary in the Barry case, it is difficult to see why it was in Haines. Judge Sarokin's remarks seem to be no more closeminded or biased than Judge Jackson's, yet the former was removed from a case while the latter was not. Such are the vagaries of a standard that is inherently subjective and is a matter of degree that cannot be determined by bright lines.

VI. PERSONAL BIAS OR PREJUDICE

It is possible, however, to be more definitive regarding another facet of impartiality which concerns bias or prejudice. Although justice need not be devoid of passion, it should be applied without personal bias or prejudice toward individuals. Judges should apply the

127. Id. at 264.
128. Id.
129. Id. at 262.
130. Id. at 265.
131. Id. at 263.
132. Id. at 264.
133. Id. at 263.
134. Id.
135. Id. at 265.
lack uniformly and consistently to all persons. In other words, judicial impartiality should be akin to equal protection of the law. Judges should apply the law equally or impartially to all persons.136

This principle is violated when a judge has a personal bias or prejudice concerning one of the parties to a controversy. A feeling of ill will or, conversely, favoritism toward one of the parties is improper, and indicates that a judge does not possess the requisite degree of impartiality to decide a case fairly.

A clear example of improper personal bias can be seen in a 1987 Pennsylvania case involving a judge who was presiding over litigation involving the National Fuel Gas Supply Corporation.137 During the course of the litigation, the judge said: "I hate the damn gas company and if I could find a way to rule against them I would."138 A statement such as this one manifests improper personal bias because it shows that the judge who made the statement is predisposed against one of the parties on the basis of personal animosity. Instead of listening to the evidence and making a ruling on the basis of law, the judge is looking for a way to rule against the gas company because he detests it. He has gone into the case with his mind set against the gas company because he hates it.139

Improper personal bias has been found in several cases where judges are prejudiced against certain classes of criminal defendants. In one case, a judge announced that he would follow a policy of sentencing all violators of the Selective Service Act to at least thirty months in jail, despite any extenuating circumstances.140 A reviewing court ruled that the judge's policy amounted to personal bias against a class of defendants that resulted in abuse of the judge's responsibility to tailor sentences to the individual defendant.141 In another case, a judge was found to be prejudiced against a class of litigants when he expressed his disagreement with sentencing guidelines and said that

136. See U.S. Const. amend. XIV (providing that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws").
138. Id. at 366.
139. The judge later asserted that his remark about the gas company was inconsequential and was being blown out of proportion. He claimed that he made the remark "with tongue in cheek," and that eventually he ruled in favor of the gas company. Id. at 367. Nonetheless, the Pennsylvania Supreme Court found that "tongue-in-cheek remarks which announce that the judge will favor one party over another are grossly improper, and if such remarks are made, the judge who makes them must stand down from any controversy in which he has indicated a bias." Id.
140. United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973).
141. Id. at 529.
the maximum penalty should be imposed in all drug cases. The reviewing court found that the judge's statements indicated a predetermined policy in regard to sentencing drug offenders and a personal bias against a particular class of litigants, which required recusal from the drug case over which he was presiding.

Some of the cases involve judges who are candid enough or disingenuous enough to make extremely biased remarks in the presence of others. In reviewing reported cases, it is disconcerting to see how frequently judges make biased remarks in court or elsewhere in public. Judges often express personal animosity toward attorneys or, although less frequently, toward litigants. The case law is also replete with instances where judges have expressed racial, ethnic, or gender bias. Perhaps this is not surprising. Judges, after all, are human beings, and, although we might hope for more from judges, it must be admitted that they are not immune to the baser motivations of human behavior. Still, judicial comments that manifest this sort of extreme and improper bias should be the basis for disqualification of a judge, not to mention further action against him or her.

Unfortunately, there are severe limitations in attempting to deal with bias and prejudice by focusing upon remarks or comments that judges make. While improper remarks or comments of judges should not be tolerated, the greater danger is the state of mind where bias and prejudice reside. These evils may be present there and may affect a judge's rulings, even though the judge makes no remark or comment to reveal them. One can get the impression from reading the case law that even though a judge has a biased state of mind, he or she can conceal it by saying as little as possible. In fact, one reviewing court has been quite forthright in stating that "in terms of [a judge's] usefulness in later cases, it would have been better had he not given voice to

143. Id. at 1089.
145. See, e.g., In re Sutter, 543 F.2d 1030 (overturning trial judge's assessment of $1,500 against appellant for three-day delay in trial because the fine seemed colored by personal animosity on the part of the judge).
146. See, e.g., Catchpole v. Brannon, 36 Cal. App. 4th 237 (1995) (holding that judicial statements suggesting gender bias warranted reversal of court's ruling because the average person might have justifiably doubted whether trial was impartial); Iverson v. Iverson, 11 Cal. App. 4th 1495 (1992) (holding that language used by trial judge indicated gender bias affecting resolution of credibility issues thus requiring reversal of court's ruling); In re Stevens, 31 Cal. 3d 403 (1982) (holding that repeated use by judge of racial and ethnic epithets to counsel and court personnel in in-chambers conferences, although performing judicial duties fairly and equitably and free from actual bias, warrants public censure).
his sentiments." Unfortunately, however, that would do nothing to alleviate the judge's state of mind. Indeed, if a judge is prejudiced, his or her silence masks a situation that calls for a strong remedy. The goal should not be to prevent or punish remarks and comments, but rather to eliminate bias and prejudice, which are the real root of the danger.

Certain kinds of bias are incompatible with the judicial function and are unacceptable in judges. Clearly, racial bias should play no part in the judicial temperament. In the vast majority of situations that come before judges, race is an irrelevant consideration that has nothing to do with the matter at hand since racial bias often is based upon misguided stereotypical thinking about groups of people. Racial bias is demeaning and offensive to the individuals to whom it is directed. It denies equal protection of the law, and simply has no place in the judicial process.

Similarly, gender bias and bias based on ethnic or religious background is inappropriate for a judge and should be excluded from the judicial process. In fact, bias against any class of persons may be incompatible with the judicial function, because class bias incorrectly ascribes the attributes of a group of persons to individual members of the group. Where a judge has a predilection against a class of persons, it may operate to improperly predetermine the facts of individual cases and deny a litigant the right to have his or her case decided on the evidence presented at trial. Thus, the 1990 Code of Judicial Conduct expressly prohibits judges in the performance of their duties from manifesting bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

Further, in regard to off-the-bench activities, the 1990 Code prohibits judges from belonging to organizations that practice invidious dis-

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147. Commonwealth v. Dane Entertainment Servs., Inc. 467 N.E.2d 222, 225 (Mass. 1984). The court stated that the judge's expression of sentiments about defendant's films was not advisable but this alone did not disqualify the judge. Id.


149. MODEL CODE Canon 3B(5) states that a judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, education, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's discretion and control to do so.

Id.
crimination on the basis of race, sex, religion, or national origin, because membership in such organizations gives rise to the appearance of bias or prejudice. Commentary to the Code explains that whether an organization practices invidious discrimination is often a complex question which cannot be resolved from a mere examination of the organization’s membership rolls. Rather, it may depend on how the organization selects its members, as well as other factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate concern to its members, or that it is a purely private organization whose membership is within the constitutional right of privacy. In the absence of these factors, invidious discrimination will be found to exist if an organization excludes persons from membership for no other reason than their race, religion, sex, or national origin.

In addition to prohibiting a judge from belonging to an organization that practices invidious discrimination, the 1990 Code also prohibits a judge to regularly use or to arrange a meeting at a club that the judge knows practices invidious discrimination. This prohibition recognizes that any public approval by a judge of invidious discrimination diminishes public confidence in the integrity and impartiality of the judiciary.

VII. AVOWALS OF IMPARTIALITY

When motions are made to judges to disqualify themselves on the ground of bias or prejudice, they often respond by denying the motion coupled with an avowal of openmindedness. “I have determined in my own mind” a judge might proclaim, “that I am openminded and impartial about this case, and free from bias or prejudice.” One sometimes wonders if judges truly believe these statements. Given the human tendency not to admit one’s own shortcomings, I suspect that most judges do believe these statements, although doubt may lurk somewhere in their heart of hearts. Moreover, even if a judge does remain openminded despite indications to the contrary, there is still an appearance of partiality, which is problematic. I wonder how many

150. MODEL CODE Canon 2C provides: “[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.” Id.
151. MODEL CODE Canon 2C cmt.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
judges have considered that their avowals of openmindedness may have a very hollow ring in the public ear. And after all, the Code of Judicial Conduct does state that a judge shall disqualify himself or herself if the judge's impartiality "might reasonably be questioned."

Supposedly, the standard that governs the appearance of impartiality is an objective one: whether an objective observer fully informed of the relevant facts would reasonably doubt a judge's impartiality.

Nonetheless, even some reviewing courts have been excessively receptive to accepting declarations of apologetic openmindedness after judges have been challenged for bias or prejudice. In fact, the case law suggests that a judge can successfully fend off a charge of improper bias or prejudice merely by stating on the record that his or her mind is still open and that a final decision on the matter will not be made until the close of all the evidence. All too often, bias or prejudice can be cleansed, so to speak, merely by professing a pure heart and an open mind. While in reality these sorts of avowals of impartiality may be dubious, some reviewing courts have tended to accept them with an uncritical eye. Perhaps this leniency is rooted in the exigency of avoiding numerous recusals of judges; but whatever the reason, the fact remains that a mere recitation by a judge that he or she remains openminded despite signs suggesting otherwise may be too readily accepted by the reviewing courts.

For example, in People v. Hall, the Supreme Court of Illinois ruled that recusal of a trial judge was not required where the defendant in a criminal case had physically assaulted the judge (as well as the public defender). In refusing to disqualify the judge, the state supreme

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157. Id. Canon 3E.

158. See Pepsico, Inc. v McMillan, 764 F.2d 458, 460 (7th Cir. 1985) (holding that a judge’s allowance of an inquiry by a third party for possible future employment with a law firm involved in the proceeding before him created an appearance of impartiality and warranted the judge’s recusal).

159. See, e.g., United States v. Sturman, 951 F.2d 1466, 1482 (6th Cir. 1991) (accepting judge’s statement that he set aside his feelings toward defendant as factor supporting finding that judge was impartial); People v. Hall, 499 N.E.2d 1335, 1347 (Ill. 1986) (accepting trial judge’s statement that he would not allow himself to be prejudiced by defendant physically assaulting him); Banks v. Department of Human Resources, 233 S.E.2d 449, 450 (Ga. 1977) (accepting trial judge’s statement that despite strong remarks disapproving of defendant’s behavior, “his mind was not closed on the subject . . .”); State v. Smith, 242 N.W.2d 320, 323 (Iowa 1976) (accepting trial judge’s explanation for his statement that “the defendant may stand a better chance with a jury than with me”); Commonwealth v. Leventhal, 307 N.E.2d 839, 842-43 (Mass. 1974) (accepting trial judge’s explanation for his statement “that doesn’t give a person a license to steal”); see also In re Gridley, 417 So. 2d 950, 955 (Fla. 1982) (finding that trial judge’s strenuous public criticism of death penalty did not interfere with the performance of judicial duties or decrease public confidence in the impartiality of the judiciary where judge included statement that he would do his duty as a judge to follow the law as written).

160. 499 N.E.2d at 1335, 1347.
court noted that the record failed to show any unfairness to the defendant and pointed to the judge’s declaration that “I have determined in my own mind that I shall not allow [the defendant’s behavior] to prejudice me in any way and that I will be completely fair and impartial in this case . . . .”¹⁶¹ Readily accepting the judge’s avowal of impartiality, the reviewing court asserted that “The trial court is in the best position to determine whether it has become prejudiced against the defendant.”¹⁶² This, of course, assumes that trial judges can look into themselves and admit their own biases and prejudices, a practice at which human beings are not always proficient. It also ignores that trial judges may be in the worst position to determine whether they appear to be biased or prejudiced and should be disqualified on that basis.

A hypothetical situation similar to the one in Hall was presented to judges in a recent survey concerning disqualification.¹⁶³ Their responses to the hypothetical strongly favored disqualification.¹⁶⁴ This suggests that the respondents either doubted that a judge could in fact remain impartial after being assaulted by a defendant or that if actual prejudice did not occur, the appearance of it certainly did.

Still, many appellate courts unquestioningly accept avowals of openmindedness from trial judges. One notable and recent exception is In re Schenck,¹⁶⁵ a 1994 Oregon decision. This case concerned a number of incidents with escalating ramifications between a judge and an attorney. After several of the incidents had occurred, the attorney filed a complaint with the Oregon judicial commission, asserting that the judge had violated the Code of Judicial Conduct by incorrectly refusing to recuse himself in a case. The next day, the judge and attorney had a telephone conversation, during which the judge said, “Who in the hell made you God’s gift to the legal profession?”¹⁶⁶ And about a week later, the judge sent a letter to the local bar association with a copy of the attorney’s complaint, which the judge described as “pathetic” and ‘petulant.”¹⁶⁷

¹⁶¹. Id.
¹⁶². Id.
¹⁶⁴. See id. (reporting that judge-respondents expressed a strong disposition to disqualify themselves from a case when the criminal defendant had previously physically assaulted the judge).
¹⁶⁵. 870 P.2d 185 (Or. 1994).
¹⁶⁶. Id. at 192.
¹⁶⁷. Id.
When the attorney subsequently had another case assigned to the same judge, he made a motion to disqualify the judge on the ground that the judge was biased against him by virtue of their previous confrontations. The judge denied this motion, and in a relatively lengthy statement, explained that whatever may have transpired between him and the lawyer, the judge believed that he could be fair and impartial in presiding over the case at bar.

The Supreme Court of Oregon, however, disagreed, and found that the judge's refusal to recuse himself was a violation of Canon 3C of the Code of Judicial Conduct. The court noted that a judge is not ordinarily disqualified from presiding over a case where one of the attorneys has filed a disciplinary complaint against the judge, because to do so would allow attorneys to "judge shop" by creating disqualifying bias. The court also noted that harsh words between a judge and lawyer do not usually call for recusal. However, if a judge responds to a complaint filed by an attorney against the judge by affirmatively publicizing it and by angrily rebuking the attorney who filed it, the cumulative effect may be enough to establish disqualifying bias on the part of the judge. Thus, in the aggregate the judge's actions created an appearance of bias, if not actual bias, that required his recusal from the case.

Moreover, in addition to finding that there were reasonable grounds to question the impartiality of the judge, the Oregon Supreme Court further ruled that the judge's refusal to recuse was misconduct in wilful violation of Canon 3C and therefore subject to sanction. The judge's expressed avowal that he could be impartial was not convincing to the court; notwithstanding the judge's protestations to the contrary, the court thought that his impartiality could reasonably be questioned and that he should have known as much. Thus, his refusal to recuse himself was a wilful violation of Canon 3.

Under this approach, a judge's statement that he or she can maintain impartiality will not be accepted by a reviewing court at face value, and if a judge's avowal of impartiality is contradicted by the surrounding circumstances, the judge's refusal to step aside can amount to a wilful violation of Canon 3C.

168. Id.
169. Id. at 194.
170. Id. at 195.
171. Id. at 194-95.
172. Id. at 195.
173. Id.
174. Id.
At this point in the Schenck case, the judge argued that to discipline him for violating Canon 3C would take him by surprise and hence deprive him of due process of law. But the Oregon Supreme Court thought otherwise. The court stated that there are objective standards by which the judge should have realized that his impartiality was subject to reasonable question. These objective standards, the court thought, provide sufficient notice to a judge as to when recusal is required.

VIII. Conclusion

The Schenck case is an example of a judge whose passion was misdirected. This happens, probably more often than we would like, but perhaps not more often than we should expect. Judging, after all, is a difficult and consuming task. Making decisions about other people’s lives is a serious responsibility that engages both intellect and emotion. This author believes that the judicial task of making difficult decisions is advanced when judges care about the law as well as about facts—in short, when they have a passion for life. Judicial passion, however, must be tempered. It should not be infested with hostility, hatred, bias, or prejudice.

Justice Holmes represents the apotheosis of the traditional concept of judicial detachment. That sort of detachment in any human being is extremely rare, if not impossible. Moreover, it is hardly an essential element of judicial impartiality. As Justice Cardozo knew well, passion enriches the judicial temperament and enhances the law.

175. Id.
176. Id. at 196.
177. Id.